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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether an order of a district court under the fourth sentence of 42 U.S.C. 405(g) is subject to appeal by a Social Security claimant who is aggrieved by that order in that she sought outright reversal of the underlying administrative decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 108 F.3d 228. The opinion of the district court (Pet. App. 15-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1997. A petition for rehearing was denied on May 29, 1997. Pet. App. 41. The petition for a writ of certiorari was filed on August 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1991, petitioner applied for Social Security

disability benefits under 42 U.S.C. 416 and 423, alleging disability due to fibromyalgia and depression. Pet. App. 26. After extensive proceedings, an administrative law judge (ALJ) of the Social Security Administration (SSA) denied petitioner's claim on the ground that, although she was incapable of returning to her former line of work as a cook and kitchen manager, she was able "to perform a wide range of sedentary [jobs] existing in significant numbers in the national economy." Id. at 35. In making that determination, the ALJ rejected the medical opinion of petitioner's treating physician (who had supported her disability claim); found that petitioner's own testimony lacked credibility in critical respects; drew conclusions from a vocational expert's answers to hypothetical questions concerning petitioner's disabilities; and accepted that expert's testimony as to the kinds of work that petitioner was able to perform. Id. at 26-38; see also id. at 21-25. The SSA's Appeals Council denied petitioner's request for review. Id. at 39.

2. Petitioner sought judicial review in federal district court under 42 U.S.C. 405(g), requesting, as relief, "[t]hat th[e] court reverse and set aside the decision of [respondent] denying [petitioner's] claim for disability benefits." C.A. E.R. 242.[1] She contended, inter alia, that the ALJ should not have

[1] Petitioner also requested, "[i]n the alternative, that th[e] court remand the case back to the Secretary [of Health and Human Services] for proper evaluation of the evidence or a hearing de novo." Ibid. During the course of this litigation, the Commissioner of Social Security was substituted as the defendant for the Secretary of Health and Human Services.

rejected either her treating physician's opinion or her own testimony concerning her disability, and that the ALJ's hypothetical questions to the vocational expert were improper. The district court rejected each of those arguments. Pet. App. 22-24.

The district court nonetheless determined, as petitioner had argued, that the record did not support the ALJ's finding that petitioner was capable of performing certain identified jobs existing in the national economy. Those jobs, the court observed, required "frequent or constant reaching," and the ALJ had not rejected another physician's "assessment that [petitioner's] ability to reach is impaired." Id. at 24. Thus, because "the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy," the court remanded the case for further proceedings pursuant to sentence four of 42 U.S.C. 405(g), see Pet. App. 25, which authorizes a district court to enter "a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."[2] See also C.A. E.R. 257 (final judgment).

[2] A "sentence-four" remand terminates the litigation, such that a claimant must file a new civil action if he wishes to contest the agency's post-remand determinations. See Sullivan v. Finkelstein, 496 U.S. 617 (1990). In that and other respects, a sentence-four remand is "entirely different" from a remand under the sixth sentence of Section 405(g). Id. at 626. Sentence six provides, inter alia, that the district court may remand the case to the agency either when (for good cause) the Commissioner requests the remand before filing an answer or when the district court learns of material new evidence that was not available to the claimant at the time of the prior administrative

3. Petitioner appealed the district court's order, renewing her contention that, if she prevailed on the issues the district court had resolved against her, the agency's decision should be reversed outright and the case should be remanded solely for payment of benefits, not for additional administrative proceedings on the merits. See Pet. C.A. Br. 18 ("the agency's decision should be reversed and [petitioner] should be found disabled"); see also id. at 35; Pet. 2, 10. The court of appeals dismissed the appeal on procedural grounds. Pet. App. 1-13.[3]

The court first acknowledged that, under Sullivan v. Finkelstein, 496 U.S. 617 (1990), an order under sentence four that sets aside the Commissioner's decision denying benefits and remands to the Commissioner for further proceedings on the merits of the claim is a "final judgment" with respect to all parties. Pet. App. 10. Moreover, under sentence eight of 42 U.S.C. 405(g), that order "shall be subject to review in the same manner

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proceeding. A district court that has granted a sentence-six remand retains jurisdiction of the case while the administrative proceedings are pending. Sentences four and six of 42 U.S.C. 405(g) provide the exclusive means by which a district court reviewing a final agency decision denying Social Security benefits may remand the case to the agency for further proceedings. See generally Melkonyan v. Sullivan, 501 U.S. 89, 97-98 (1991).

[3] In its brief, the government had asked the court of appeals to address petitioner's claims on the merits. See Gov't C.A. Br. 1 (asserting that the district court's remand order is a "final" and "appealable" order, "over which this court has jurisdiction pursuant to 28 U.S.C. § 1291"). We have been informed, however, that at oral argument, after the court had given notice of its intent to address the issue, counsel for the government contended that petitioner's appeal should be dismissed on procedural grounds.

as a judgment in other civil actions." See Finkelstein, 496 U.S. at 625. The court nonetheless held that the finality of the district court's judgment in this case "does not necessarily entitle [petitioner] to appeal the district court's decision," because "[a] prevailing party normally may not appeal the decision in its favor." Pet. App. 10. "There can be little doubt," the court continued, "that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed." Ibid. The court reasoned that, on remand, petitioner might secure all the relief she seeks and, "[i]f she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record." Ibid.[4]

Finally, the court of appeals rejected petitioner's argument that, if she were awarded no benefits on remand and had to bring an entirely new civil action to challenge that adverse decision, principles of res judicata and collateral estoppel would bar her from challenging the district court's adverse rulings in the

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[4] The court of appeals acknowledged that "there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. See Finkelstein, 496 U.S. at 623 n. 3." Pet. App. 10 n.5. The court expressed no view as to the claimant's right to appeal in that context. Ibid.

present action. Pet. App. 12. The court explained that, even though the district court might well adhere to its earlier rulings in the subsequent action, the critical question is whether petitioner could challenge those rulings on appeal. The court concluded that she would be entitled to do so, both because it would be "inappropriate to hold [her] to rulings that she was precluded from appealing," and because, in its view, the issues as to which she would seek appellate review in the subsequent action would not have been "essential to the judgment in the prior case." Ibid.

ARGUMENT

Petitioner contends that the court of appeals' dismissal of her appeal is inconsistent with the plain language of 42 U.S.C. 405(g) and with this Court's decision in Sullivan v. Finkelstein, 496 U.S. 617 (1990). We agree.

1. The question presented in Finkelstein was whether the Secretary of Health and Human Services could immediately appeal an order entered under sentence four of Section 405(g) that set aside the Secretary's denial of benefits (thereby essentially invalidating the regulations on which the Secretary relied) and remanded the case to the Secretary for further proceedings on the merits of the claim without regard to the challenged regulations. 496 U.S. at 624. This Court answered that question in the affirmative, noting, among other things, that a contrary ruling would produce an anomalous result: "should the Secretary on remand undertake the inquiry mandated by the District Court and

award benefits, there would be grave doubt * * * whether he could appeal his own order." Id. at 625. The Court also noted that it "express[ed] no opinion about appealability" in circumstances where "the person seeking judicial review * * * seek[s] to appeal on the ground that broader relief should have been granted by the district court." Id. at 623 n.3.

Nonetheless, the Court did not limit its reasoning concerning the finality of sentence-four remand orders to circumstances in which the party seeking to appeal such an order is the government rather than the claimant. Instead, it focused on the text of Section 405(g), see 496 U.S. at 627-629, which expressly declares, in sentence eight, that any sentence-four judgment providing for a remand is "final except that it shall be subject to review in the same manner as a judgment in other civil actions." As the court of appeals recognized, "to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in Finkelstein that a sentence-four remand terminates the civil action." Pet. App. 9-10; see also Shalala v. Schaefer, 509 U.S. 292, 295-297 (1993) (upon issuing sentence-four remand order, district court may not retain jurisdiction pending completion of administrative proceedings). For that reason, "[t]he civil action ending in a sentence-four remand * * * must be 'final,' in a formalistic sense, for all parties to it." Pet. App. 10.

We indicated our agreement with that position in our

principal brief on the merits in Finkelstein. We there observed that, under "the language of Section 405(g) deeming an order like that entered here to be a final judgment subject to appeal in the same manner as a judgment in other civil actions, such decisions may well be appealable by a claimant who could show that he was aggrieved by a ruling of law by the district court -- e.g., that if the court's ruling was in error he was entitled to outright reversal of the Secretary's decision." No. 89-504 U.S. Br. 21 n.17; see also p. 10, infra. In our view, this Court's ensuing decision in Finkelstein effectively compels that conclusion.

2. Although the court of appeals recognized the finality of the district court's judgment, it nonetheless dismissed petitioner's appeal on the grounds that "[a] prevailing party normally may not appeal the decision in its favor" and "[t]here can be little doubt that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed." Pet. App. 10. In our view, that principle is framed too broadly, and the court of appeals erred in applying it to dismiss the appeal in this case.

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 333 (1980); see also INS v. Chadha, 462 U.S. 919, 930 (1983); Electrical Fittings Corp. v. Thomas & Betts Corp., 307

U.S. 241, 242 (1939); 20 Moore's Fed. Prac. § 303.10[2][b], at 303-19 to 303-20 (3d ed. 1997); cf. Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971). In this case, petitioner sought an outright reversal of the agency's denial of disability benefits and an affirmative determination that she was entitled to those benefits; only as an alternative and lesser remedy did she seek a remand for further administrative proceedings on the merits of her claim. See pp. 2-4 and note 1, supra. While it is true, as the court of appeals observed, that those proceedings might ultimately "result in an award of all of the benefits claimed," Pet. App. 10, the district court's remand order deprives petitioner of the immediate and certain benefits to which she would now be entitled if the district court had granted her the outright reversal she had requested. We therefore agree with petitioner that, under principles generally applicable to "other civil actions," 42 U.S.C. 405(g), she was sufficiently aggrieved by the district court's disposition of this case that she is entitled to appellate review of the judgment. Cf. Nguyen v. Shalala, 43 F.3d 1400, 1402 n.2 (10th Cir. 1994); Pet. App. 11 n.6 (discussing Nguyen).[5]

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[5] Petitioner would be deemed a "prevailing party" for purposes of an application for attorney's fees under 28 U.S.C. 2412(d)(1)(B). See Schaefer, 509 U.S. at 300-302. As the court of appeals recognized, however, "the status of prevailing party for purposes of attorney's fees * * * does not automatically equate with status as prevailing party for purposes of appeal." Pet. App. 11. Indeed, for the latter purpose, the issue is not whether the party "prevailed" in the district court, but whether she is "aggrieved" by that court's judgment. For example, if the district court had resolved every issue in this case on the merits and had determined that petitioner was entitled to some

The practical consequence of our position regarding the jurisdiction of a court of appeals over a Social Security claimant's appeal in circumstances such as these are likely to be limited. As we observed in Finkelstein, even where claimants do have a right to appeal from a sentence-four remand order, such appeals "would surely be infrequent" for three reasons:

> First, the district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a substantial victory for a claimant. Second, any additional gains from a time-consuming appeal are unlikely, because a district court's conclusion that further proceedings should be conducted by the Secretary before there is a final resolution of the claim for benefits would be subject to only the most limited review by a court of appeals. Third, and by way of contrast, the claimant has a very good prospect of prevailing in the proceedings on remand: we have been informed by the Department of Health and Human Services that, following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary.

No. 89-504 Br. 21 n.17.[6] In this case, however, petitioner has

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but not all of the benefits she has sought, petitioner would qualify as a "prevailing party" for purposes of attorney's fees, but she would also have a right to appeal the judgment to seek additional benefits.

[6] In our view, when either the claimant or the Commissioner forgoes an appeal in favor of further administrative proceedings, neither will normally be barred, in a subsequent action under Section 405(g) seeking judicial review of the Commissioner's new decision on remand, from raising issues resolved against him in the first district court action. While the second round of judicial review would be a new civil action in court, there is but one underlying administrative proceeding before the Secretary on the application for benefits. In these circumstances, we do not believe that the second round of judicial review is sufficiently separate from the first round to trigger application of claim or issue preclusion. To be sure, in the second round of judicial review, the district court, applying law-of-the-case-type principles, see Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997), might choose not to revisit issues it resolved in the

sought to appeal the district court's remand order. We believe that she is entitled to do so, even though the district court's conclusion -- that further administrative proceedings are necessary before there can be a final resolution of her claim -- "is subject to only the most limited review by a court of appeals." Ibid.

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first round of judicial review. But neither the district court nor the court of appeals would be altogether barred by issue or claim preclusion principles from doing so. A rigid rule of preclusion would create undesirable incentives to avoid participating in administrative proceedings on remand, even though such proceedings can provide the most efficient means of resolving a given dispute. For these reasons -- and in light of the special attributes of judicial review of agency action, in which the agency has primary jurisdiction and the matter ordinarily should be returned to the agency if the court finds a flaw in its decision, see FPC v. Idaho Power Co., 344 U.S. 17, 20-21 (1952); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1940) -- the relevant policy considerations do not support application of issue preclusion. See generally Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979) (discussing centrality of policy concerns in determining scope of collateral estoppel doctrine); United States v. Mendoza, 464 U.S. 154 (1983) (discussing unique status of federal government for purposes of that doctrine).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the position asserted in this brief.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
MARY K. DOYLE
Attorneys

NOVEMBER 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FORNEY, SANDRA K. Petitioner	)	
vs.	)	No. 97-5737
KENNETH S. APFEL, COMMISSIONER OF SSA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE RESPONDENT** by first class mail, postage prepaid, on this 26th day of November 1997.

RALPH WILBORN
1580 VALLEY RIVER DRIVE
SUITE 170
EUGENE, OR 97401

Seth P. Waxman proj

SETH P. WAXMAN
Solicitor General

November 26, 1997

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